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FILED
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MICHAEL RODAK, JR., CLERK

in the

Supreme Court

of the

United States

OCTOBER TERM, 1972

NO. 72-1013

LIONEL JAMES HANNA,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

Law Offices of
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MIAMI REVIEW — 371-4853 — 377-3721

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In the Supreme Court of the United States

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LIONEL JAMES HANNA,

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THE STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the District Court of Appeal of Florida, Fourth District, entered in the above styled case on June 20, 1972. The Petition for Rehearing was denied August 25, 1972.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court of Appeal of Florida, Fourth District, is reported at _____ So.2d _____ and is printed at Appendix A. The opinion of the Supreme Court of Florida denying the Petition for Writ of Certiorari is reported at _____ So.2d _____ and is printed at Appendix B.

JURISDICTION

The Judgment of the District Court of Appeal of Florida, Fourth District, was entered on June 20, 1972. The Florida Supreme Court denied Certiorari on November 16, 1972. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257 (3).

QUESTION PRESENTED

Is it a violation of a criminal defendant's Fifth Amendment Right to remain silent to allow a prosecutor during closing argument to call the jurys attention to the fact that the Defendant did not testify?

STATEMENT OF THE FACTS

The Petitioner, Lionel J. Hanna, was charged by Information with eleven (11) felonous offenses. He was arraigned on the 3rd of May, 1971 and entered a plea of not guilty to all charges. A three (3) day jury trial began on August 10, 1971. On August 12, 1971, the jury returned with a verdict of guilty as to Court IV, which was a violation of Florida Statutes 784.04. Further, the Petitioner was found guilty of a bare assault as to Count VI.

The Petitioner exercised his constitutional right to remain silent and did not testify during the jury trial. During closing argument the prosecution had the following to say:

"MR. PARKER: Dangerous weapon. Of course, there was a pistol, of course. I wasn't there, I don't know. I can't get inside L.J.'s head. I'm just as glad I can't. But I know that there was a pistol put to the side of her head and it clicked twice, you know that. You got it even from Alfonso that the word was 'Oh, I ought to kill you now.'

MR. FOLEY: Judge, I'm going to object to the prosecutor's remarks that he can't get inside L.J.'s head as being improper and —

THE COURT: Sustained. The jury is instructed to disregard that. Let's get moving.

MR. FOLEY: Judge, I think that was a comment on the defendant's failure to take the stand and move for a mistrial.

THE COURT: Denied." (R. 447)

* * *

"MR. PARKER: I feel that the State of Florida has presented an exceptional case here in this Courtroom. We have heard the testimony, I think, where is Sharon White? I told you at the beginning it would be the case of the missing victim if I were Perry Mason. All right. Where

is she? Tom Foster has been trying to locate her and indicated that other law enforcement people have. Where is she? I don't know, I don't know, I don't know where she is. But there is someone in this Courtroom who knows where she is.

MR. FOLEY: Judge, I again move for a mistrial on the basis the prosecutor is referring to somebody knows where she is and that is an indirect comment on the defendant's failure to take the stand, Judge.

THE COURT: Motion denied, but the jury is instructed to disregard the last statement by counsel." (R. 450)

In both instances the prosecution either directly or inferentially commented on the defendant's failure to testify in his own behalf. Accordingly, Motions for mistrial were made in behalf of the Petitioner. Each motion was denied by the trial court.

REASONS FOR GRANTING THE WRIT

During the closing argument in the instant case the prosecution either directly or inferentially commented upon the failure of the Petitioner to testify in his own behalf. The statements of the prosecution are quoted in the Statement of Facts. Each statement of the prosecution resulted in a motion for mistrial being tendered in behalf of the Petitioner. All motions for mistrial were denied by the trial court. It is submitted in behalf of the Petitioner that his fundamental constitutional rights as interpreted by this Court have been violated.

In **Griffin v. California**, 380 U.S. 609, 85 S. Ct. 1229 (1965) the Court determined that several remarks by a prosecutor during the course of a trial were violations of the man's constitutional rights. Amongst those remarks were:

> "The defendant certainly knows whether . . . had this beat up appearance at the time he left her apartment and went down the alley with her."
>
> * * *
>
> "What kind of man is it that would want to have sex with a woman that beat-up if she was beat-up at the time he left?"
>
> * * *
>
> ". . . is dead, she can't tell you her side of the story. The defendant won't."

The Supreme Court granted Certiorari to determine whether those above quoted statements violated the Fifth Amendment. This Court noted that "Comment on the refusal to testify is a remnant of the inquisitorial system of criminal justice," which the Fifth Amendment prohibits. It was concluded in the Griffin Opinion that the Fifth Amendment forbids "Either comment by the prosecution on the accused's silence or instructions by the Court that such silence is evidence of guilt."

In **Malloy v. Hogan**, 378 U.S. 1, 84 S.Ct. 1489 (1964) this Court addressed itself to the question of whether the Fifth Amendment was binding upon the States' through the Fourteeth Amendment. It was there held that "The Fourteenth Amendment secures against State

invasion the same privilege that the Fifth Amendment guarantees against Federal infringment — The right of a person to remain silent unless he chooses to speak in the federed exercise of his own will, and to suffer no penalty, . . . , for such silence." In the case presented to this Court the Petitioner exercised his own federed will not to testify. The prosecution's comments certainly were a penalty imposed for the exercise of that right.

It should be noted that the State of Florida is amongst those jurisdictions that prohibit comment upon the failure of an accused to testify. See Florida Statute 918.09. The Florida cases interpreting the above mentioned statute have recognized both the statutory and constitutional protection. See **Burse v. State,** 175 So.2d 586 (Fla. App. 1965); **Flaherty v. State,** 183 So.2d 607 (Fla. App. 1966); and **Trafficante v. State,** 92 So.2d 811 (Fla. App. 1957).

In the instant case the trial court and the appellate court chose either to ignore those rights of the Petitioner or held that the comments complained of were not comments on the failure to testify. Whichever conclusion the lower courts reached it is submitted that they were erroneous. To protect this Petitioner's constitutional rights this Court should grant a Writ of Certiorari and quash the opinion below.

CONCLUSION

For the above reasons it is submitted that the Writ of Certiorari in this case should be issued and the Court should consider this case on the merits.

Respectfully submitted,

Law Office of
POLLACK, YOCOM & HAGGARD
Suite 100
1700 N. W. 7th Street
Miami, Florida

By _____
PAUL POLLACK

IN THE SUPREME COURT OF THE UNITED STATES

NO:

LIONEL JAMES HANNA,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

STATE OF FLORIDA :

: SS

COUNTY OF DADE :

AFFIDAVIT OF SERVICE

I, PAUL POLLACK, first being duly sworn according to law, do depose and say:

I HEREBY CERTIFY that a copy of the Petition for Writ of Certiorari to the Supreme Court of the United States was served upon the office of the HONORABLE ROBERT L. SHEVIN, Attorney General, Pan Am Building, West Palm Beach, Fla., this 11th day of June, 1973, by mailing a copy of same to him by United States Mail, First Class postage prepaid, pursuant to Rule 33 of this Court.

PAUL POLLACK
Counsel for Petitioner

SWORN TO AND SUBSCRIBED TO
before me at Miami, Dade County,
Florida, this 10th day of
January, 1973

NOTARY PUBLIC, State of Florida
at Large

My Commission Expires:

NOTARY PUBLIC STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES OCT. 24, 1976
BONDED THRU GENERAL INSURANCE UNDERWRITERS

APPENDIX A

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT JANUARY TERM 1972

CASE NO. 71-807.

LIONEL J. HANNA,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Opinion filed June 20, 1972.

Appeal from the Criminal Court of Record for Palm Beach County; Joseph P. Metzger, Judge.

J. Brian Brennan of Foley and Brennan, West Palm Beach, for appellant.

Robert L. Shevin, Attorney General, Tallahassee, and Nelson E. Bailey, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

We have reviewed the briefs and record on appeal and heard oral argument. On the basis thereof, we are of the opinion that no reversible error has been demonstrated. The judgment appealed from is, therefore, affirmed.

WALDEN and MAGER, JJ., and WHITE, JOSEPH S., Associate Judge, concur.

APPENDIX B

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT

JULY TERM 1972

CASE NO. 71-807.

LIONEL J. HANNA,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

August 25, 1972.

ORDERED that appellant's petition for rehearing, filed July 3, 1972, is hereby denied.

A TRUE COPY

EMMETT J. COMISKEY
CLERK

By: CLAIRE E. CAMPBELL
Deputy Clerk

cc: Foley and Colton
Nelson E. Bailey, Esq.

APPENDIX C

IN THE SUPREME COURT OF FLORIDA

JULY TERM., A. D. 1972

THURSDAY, NOVEMBER 16, 1972

CASE NO. 42,830

DISTRICT COURT OF APPEAL, FOURTH DISTRICT

LIONEL J. HANNA,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

ROBERTS, C.J., CARLTON, ADKINS and DEKLE, JJ., concur

ERVIN, J., dissents

A True Copy

TEST:

SID J. WHITE
Clerk Supreme Court.

by: DAVE LANG, JR.
Chief Deputy Clerk
Supreme Court of Florida

Y

CC: Hon. E. J. Comiskey, Clerk
Hon. John B. Dunkle, Clerk
Hon. Joseph P. Metzger, Judge

Pollack & Yocom
(Hon. Paul Pollack)
Hon. Robert L. Shevin
(Hon. Reeves Bowen)
Hon. Nelson E. Bailey